Supreme Court, U.S.
FILED

(1)

97 . 181 JUN 26 1997

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1996

LAWRENCE FAFARMAN,
Petitioner,

-VS-

STATE OF CALIFORNIA
and
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE 9TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lawrence Fafarman
5298½ Village Green
Los Angeles, CA 90016
(213) 293-6029
Petitioner, *pro se*

20 pp

QUESTIONS PRESENTED

Three issues are presented here for review.

1st Issue: The petitioner claims that, according to Parden et al. v. Terminal Railway of the Alabama State Docks Department et al., 377 U.S. 184, 196 (1964), the State of California, by leaving "the sphere that is exclusively its own" (Parden) by enacting a tax that is (1) in an area subject to Congressional regulation and that (2) owes its existence to federal law and regulation, lost immunity -- either under the U.S. Constitution's 11th Amendment or the Tax Injunction Act (28 U.S.C. §1341) -- to federal District-Court lawsuits against that tax. Claimed basis for writ: Supreme Court Rule 10(c)

2nd Issue: The petitioner claims that, according to Rosewell v. LaSalle National Bank, 450 U.S. 503, 512(1980), the Tax Injunction Act (28 U.S.C. §1341) does not apply to this lawsuit because a State court cannot give a full hearing and judicial determination for the plaintiff's federal claim that the challenged state tax violates federal administrative waivers of federal pre-emption of new-car emissions regulations, because the only remedy for that claim would be withdrawal of the waivers, and State courts lack the authority to withdraw federal waivers. Claimed basis for writ: Supreme Court Rule 10(c)

3rd Issue: The petitioner claims that dismissal of the lawsuit against co-defendant U.S. Environmental Protection Agency (EPA) violated the principle of *res judicata* by ignoring a prior judgment by the same federal court of appeals granting the same plaintiff/petitioner standing to sue the EPA in federal District Court on the same cause of action. The prior judgment, 9th Circuit Court of Appeals Case No. 96-70179, Fafarman v. EPA, stated, "Petitioner may challenge the agency's actions only in an action filed in the district court pursuant to 5 U.S.C. §§702-704." Claimed basis for writ: Supreme Court Rule 10(a)

TABLE OF CONTENTS

QUESTIONS PRESENTED -i-

TABLE OF AUTHORITIES -iii-

CASE INFORMATION 1

STATEMENT OF CASE

BASES OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE (DISTRICT COURT) 2

BACKGROUND 2

REASONS FOR ALLOWANCE OF WRIT

FIRST ISSUE FOR REVIEW 4

SECOND ISSUE FOR REVIEW 7

THIRD ISSUE FOR REVIEW 8

SUMMARY AND SUPREME COURT RULE 10 REASONS 9

APPENDIX 1a

TABLE OF AUTHORITIES

California et al. v. Grace Brethren Church et al., 457 U.S. 393(1982)	6
Edelman v. Jordan, 415 U.S. 651, 664-67(1974)	7
Fafarman v. EPA, 9th Circuit Court of Appeals, Case No. 96-70179	8
Jordan v. Calif. Dept. of Motor Vehicles, Case #95AS05228, California Superior Court, County of Sacramento	3
Parden et al. v. Terminal Railway of the Alabama State Docks Department et al., 377 U.S. 184, 196(1964)	4,6,9
Rosewell v. LaSalle National Bank, 450 U.S. 503, 512 (1980)	7,9
House Report 899, 89th Congress, 1st session at 5	5
5 U.S.C. §§702-704	2,9
28 U.S.C. §1254(1)	1

28 U.S.C. § 1341 (Tax Injunction Act)	4,7
42 U.S.C. §7543(a)	2,6
42 U.S.C. §7543(b)	2,3,5,8
California Revenue and Taxation Code, §§6261-6263 (Vehicle Smog Impact Fee)	2
U.S. Constitution, art. I, sec. 8, cl. 3 (Commerce Clause)	3
U.S. Constitution, art. IV, sec. 2, cl. 1 (Privileges and Immunities Clause)	3
Eleventh Amendment of U.S. Constitution	4

CASE INFORMATION

Official and/or unofficial court opinions or orders: Fafarman v. Calif. and EPA, 9th Circuit Court of Appeals Case No. **96-55384**, appealed from District Court Case CV-95-6906-TJH(BQRx), Central Dist. of Calif., Western Div.

Official and/or unofficial agency statements: no agency, including the co-defendant U.S. Environmental Protection Agency (EPA), has made any statement concerning the issues raised in this petition.

Date of entry of judgment: December 20, 1996

Date of entry of denial of rehearing: April 29, 1997

Statute conferring jurisdiction on U.S. Supreme Court: 28 U.S.C. §1254(1).

Constitutional provisions and statutes involved in the case:

42 U.S.C. §7543(a), prohibition of State new-car emissions regulations, and 42 U.S.C. §7543(b), the so-called "California waiver" provision.

28 U.S.C. §1341 (Tax Injunction Act)

5 U.S.C. §§702-704 (from Administrative Procedures Act)

California Revenue and Taxation Code §§6261-6263 ("Vehicle Smog Impact Fee")

Commerce Clause of U.S. Constitution (Art. I, Sec. 8, Clause 3)

Privileges and Immunities Clause of U.S. Constitution (Art. IV, Sec. 2, Clause 1)

Eleventh Amendment of U.S. Constitution

STATEMENT OF CASE

BASES OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE (DISTRICT COURT)

The disputed claim to the District Court's jurisdiction is based on the following: (1) federal constitutional questions; (2) entanglement of federal laws (42 U.S.C. §7543); (3) an essential federal defendant, the EPA; and (4) 5 U.S.C. §§702-704 (Administrative Procedures Act).

BACKGROUND

Under 42 U.S.C. §7543(b), sometimes called the "California waiver" provision, the EPA has on several occasions granted California a waiver of 42 U.S.C. §7543(a), which established general federal pre-emption of new-car emissions-control regulations. As a result of these waivers, hereafter called "California waivers" or simply "waivers," new cars sold in California have California emissions-control certification instead of federal emissions-control certification. However, depending on the model of vehicle, the federal emissions standards and the California emissions standards are sometimes the same. In some cases, new cars sold outside of California have California new-car certification.

With certain narrow exceptions that are not based on emissions levels, California arbitrarily charges an extra fee of $300, called the "Vehicle Smog Impact Fee" (California Revenue and Taxation Code §§ 6261-6263), for the new

registration of a used out-of-state motor vehicle if that vehicle has the federal new-car emissions-control certification instead of the California certification (as noted above, some cars that were sold new outside California have the California certification); thus, the Vehicle Smog Impact Fee is entirely based on the California waivers and owes its existence to those waivers. The California Dept. of Motor Vehicles (DMV) is directed to deposit these fees in the state's General Fund after deducting authorized administrative costs. Payment of this fee does not provide the vehicle's owner with any relief from the requirements of California's emissions-control inspection & maintenance programs, including the stringent new program known as "Smog Check II," and the fee cannot be avoided by showing that the vehicle is completely equipped with California-certified emissions controls.

The plaintiff/appellant complained to the EPA that this fee violates 42 U.S.C. §7543(b) (the so-called "California waiver" provision) and the U.S. Constitution's Commerce Clause (Art. I, Section 8, Clause 3) and Privileges and Immunities Clause (Art. IV, Sec. 2, Clause 1). In response, the EPA claimed that it had no authority to take any action -- including review of the so-called California waivers -- in regard to this fee. The plaintiff/appellant consequently sued California and the EPA in a federal district court, seeking the following relief: (1) a judicial review of the California waivers in regard to this fee; (2) nullification of the Vehicle Smog Impact Fee law; (3) full refunds of the fee, including interest. This suit was dismissed, and the plaintiff/appellant now seeks Supreme Court review of this dismissal.

Incidentally, on April 9, 1997, the California Superior Court, County of Sacramento, in Jordan v. Calif. DMV, Case #95AS05228, ruled that this fee violates the U.S. Constitution's Commerce Clause.

REASONS FOR ALLOWANCE OF WRIT

FIRST ISSUE FOR REVIEW

Both California and the EPA filed motions to dismiss the present lawsuit. In its dismissal motion, California claimed federal-court immunity under the Tax Injunction Act, 28 U.S.C. §1341, and the Eleventh Amendment of the U.S. Constitution. The plaintiff countered this dismissal motion by arguing that California has no federal-court immunity here because the Vehicle Smog Impact Fee, as noted above, is entirely based on federal laws and regulations and in fact owes its very existence to those federal laws and regulations. In support of this counter-argument, the plaintiff, citing the following U.S. Supreme Court opinion, claimed that California lost all federal-court immunity by leaving "the sphere that is exclusively its own" when it based the Vehicle Smog Impact Fee entirely on federal law and regulation:

> A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. However, when a State *leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation*, it subjects itself to that regulation as fully as if it were a private person or corporation. Parden et al. v. Terminal Railway of the Alabama State Docks Department et al., 377 U.S. 184, 196 (1964) ("Parden") Emphasis added

California, in response to the plaintiff's preceding argument, claimed that the State, in enacting the Vehicle Smog Impact Fee,

> " ... has not left a sphere that is exclusively its own and entered in activities subject to congressional regulation. A look at the plain language of the automotive emissions regulatory provisions of the Clean Air Act, Title 42 U.S.C. §7543(b), shows that *Congress granted a waiver* '...to any state which has adopted standards for the control of emissions from new motor vehicles or new motor vehicles prior to March 30, 1966 ...' " (California is the only state satisfying this condition, hence these waivers are often called "California waivers"). Appellee's Brief at 14,15 Emphasis added

The plaintiff countered California's preceding argument by pointing out that Congress did *not* grant such a waiver to California, but merely authorized the *EPA* to grant California such a waiver if -- and *only* if -- the conditions of 42 U.S.C. §7543(b) were satisfied (Reply to State Appellee at 6, 7); thus, Congress did *not* absolutely exempt California from federal automobile-emissions regulations, and even if Congress had so exempted California, federal jurisdiction would still exist because Congress would have the power to withdraw that exemption. The high geographical mobility of both automobiles and air pollution makes federal jurisdiction over automobile emissions controls a virtual necessity rather than just a convenience (As House Report 899, 89th Congress, 1st session at 5 noted, "The high rate of mobility of automobiles suggests that anything short of nationwide control would scarcely be adequate to cope with the motor

vehicle pollution problem."). Furthermore, the Smog Impact Fee is really a *new*-car regulation because it is *entirely retroactively* based on a vehicle's *new*-car emissions certification (even though the fee is assessed on used cars), and hence this fee falls directly under the Congressional jurisdiction of 42 U.S.C. §7543(a), a statute in which Congress *expressly* pre-empted *new*-car emissions regulations (actually, because this fee falls under the prohibitions of 42 U.S.C. §7543(a), this fee actually requires a California waiver, and California failed to apply for a waiver for the fee).

California cited several Supreme Court cases in support of its claim of federal-court immunity; of these cases, perhaps the one bearing the most resemblance to the present case is California et al. v. Grace Brethren Church et al., 457 U.S. 393(1982) ("Grace Brethren Church"), because that case shares the following characteristics with the present case: (1) federal constitutional issues, (2) entanglement of federal law and regulation, and (3) the presence of an appropriate (if not essential) federal party. In Grace Brethren Church, the plaintiffs asked the District Court to enjoin California from collecting both a state unemployment-insurance tax and certain information needed for collection of that tax. Now, collection of state unemployment-insurance taxes and associated tax information, as in Grace Brethren Church, is not under direct Congressional jurisdiction, so California does not leave the "sphere that is exclusively its own" by collecting such taxes and tax information, and hence such collection does not meet the above-described Parden exception to federal-court immunity (California's unemployment insurance system, rather than being subject to direct Congressional control, is only subject to *indirect* Congressional pressure, in that Congress can

withhold federal subsidies of that system if certain conditions are not satisfied). However, as explained above, the Vehicle Smog Impact Fee is in an area under *direct* Congressional jurisdiction (that area being auto emissions control regulations), and so this fee *does* fall under the Parden exception of a State leaving the "sphere that is exclusively its own." Also, the U.S. Constitution's 11th Amendment, which California invoked in the present lawsuit, was not even an issue in Grace Brethren Church.

Also, if a state's leaving "the sphere that is exclusively its own" results in the loss of 11th Amendment *constitutional* immunity from federal lawsuits, as decided in Parden, then it should certainly also result in the loss of a *statutory* immunity from federal lawsuits, the kind of immunity California claimed under the Tax Injunction Act. Also, in regard to the claim of 11th Amendment immunity, not only was this claim invalid because of Parden, but this court held in Edelman v. Jordan, 415 U.S. 651, 664-67 (1974), that the 11th Amendment does not bar a federal court from ordering *prospective* (as opposed to retroactive) relief.

SECOND ISSUE FOR REVIEW

According to Rosewell v. LaSalle National Bank, 450 U.S. 503, 512 (1980) ("Rosewell"), State courts, to meet the "plain, speedy and efficient remedy" requirement of the Tax Injunction Act (28 U.S.C. §1341), must afford a full hearing and judicial determination for all federal and constitutional claims against a state tax. The plaintiff claimed that California's Vehicle Smog Impact Fee violates the terms of

42 U.S.C. §7543(b), the so-called "California waiver" provision, and the only remedy for this claim would be withdrawal of all California waivers (withdrawal of all the waivers would end California new-car emissions certification, the sole basis of the fee), which would positively prevent assessment of the fee on cars produced in the future. State courts do not have the power to provide this remedy of withdrawing federal waivers, and hence, according to Rosewell, the Tax Injunction Act does not apply to this lawsuit because a state court cannot provide a remedy for the plaintiff's federal claim that the fee violates the California waiver provision, 42 U.S.C. §7543(b). Furthermore, since the EPA's emissions waivers for California are an issue in this lawsuit, the EPA is an essential party, and having a federal agency as an essential party is another reason why it is necessary for this case to be heard in a federal court rather than a state court.

THIRD ISSUE FOR REVIEW

As noted above, the federal co-defendant, the EPA, also moved for dismissal of the plaintiff's suit against it, and the motion was granted by the court. However, as noted above, the plaintiff charges that this dismissal was a violation of the principle of *res judicata* because an earlier judgment of the 9th Circuit Court of Appeals, Fafarman v. EPA, Case 96-70179 (filed as an original action in the Court of Appeals), which involved the same plaintiff/petitioner, the same defendant, and the same cause of action (EPA's refusal

to take action against California in response to the Vehicle Smog Impact Fee) as the present case, ruled, "Petitioner may challenge the agency's actions only in an action filed in the district court pursuant to 5 U.S.C. §§702-704." In fact, the two cases are *so* similar that the EPA's Supplemental Excerpts of Record in the present case, 96-55384, consisted entirely of the same EPA letter that was submitted for review in the other case.

SUMMARY AND SUPREME COURT RULE 10 REASONS

As noted at the beginning of this petition, three issues are raised here for review. The first two issues rely on Supreme Court Rule 10(c): "a State court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The relevant decisions alleged to conflict with the dismissal of the present lawsuit are Parden et al. v. Terminal Railway of the Alabama State Docks Department et al., 377 U.S. 184, 196 (1964), and Rosewell v. LaSalle National Bank, 450 U.S. 503, 512 (1980). The plaintiff asserts that California has no federal court immunity here because: (1) in enacting the challenged state tax, the Vehicle Smog Impact Fee, the State left the "sphere that is exclusively its own" (Parden) because this tax is in an area -- auto emissions control regulations -- that is under direct Congressional jurisdiction, and

furthermore, this tax owes its very existence to federal law and regulation; and (2) a State court cannot, as required by Rosewell, give a full hearing and determination for all federal claims, because the only remedy here for the claim of a violation of California's federal auto-emissions waivers would be withdrawal of all those waivers (which would positively prevent assessment of the fee on cars produced in the future), and withdrawal of federal waivers is beyond the power of state courts.

Also, a federal-court remedy does not necessarily duplicate a state-court remedy, because the federal-court remedy may be faster than or greater than the state-court remedy, or the federal-court remedy may supplement the state-court remedy. The requirements for a state's immunity from federal district-court tax suits are not demanding at all, and a state should not get such immunity without satisfying -- to the *letter* -- *all* of those requirements.

The third issue raised for review, the alleged violation of the principle of *res judicata*, relies on Rule 10(a): "a U.S. court of appeals .... has so far departed from the accepted and usual course of judicial proceedings ..... as to call for an exercise of this Court's supervisory power."

Lawrence Fafarman,
Petitioner, *pro se*

APPENDIX

WRITTEN OR ORAL COURT OPINIONS, ORDERS, FINDINGS OF FACT, ETC., IN THIS LAWSUIT (9TH CIRCUIT CASE 96-55384)

Order of judgment
U.S. District Court, Central District of California,
Western Division
Case No. CV-95-6906TJH(BQRx), Lawrence Fafarman v. State of California and U.S. Environmental Protection Agency
Date of Entry: Feb. 16, 1996
Before: Terry J. Hatter, Jr., District Judge
Text:

> The Court has considered Defendants' motions to dismiss, together with the moving and opposing papers.
>
> It is Ordered that the motions to dismiss be, and hereby are, granted.
>
> s/Terry J. Hatter, Jr.

Memorandum of judgment
U.S. Court of Appeals, 9th Circuit
Case No. 96-55384, Lawrence Fafarman, plaintiff-appellant, v. State of California and U.S. Environmental Protection Agency, defendants-appellees
Date of entry: Dec. 20, 1996
Before: Sneed, Trott, and Thomas, Circuit Judges
Text:

> The panel unanimously finds this case suitable for decision without oral argument. See Fed. R.

App. P. 34(a); 9th Cir. R. 34-4.

Lawrence Fafarman appeals pro se the district court's dismissal of his action for lack of subject matter jurisdiction. Fafarman alleged that the U.S. Environmental Protection Agency ("EPA") unlawfully failed to take action against California for imposing the Vehicle Smog Impact Fee to generate general revenue. We have jurisdiction pursuant to 28 U.S.C. § 1291.

After a de novo review, see Wilson v. A.H. Belo Corp., 87 F.3d 393, 396 (9th Cir. 1996), we agree with the district court that it lacks subject matter jurisdiction to hear Fafarman's claims. AFFIRMED

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Order entering denial of rehearing and denial of rehearing *en banc*.

Same court, case number, case caption, and judges as in preceding memorandum of judgment.

Date of entry: April 29, 1997

Text:

The panel has voted to deny the appellant's petition for rehearing. Judges Trott and Thomas have voted to reject the suggestion for rehearing en banc, and Judge Sneed has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OTHER RELEVANT OPINIONS, ORDERS, ETC., BY COURTS AND ADMINISTRATIVE AGENCIES

Order of judgment
U.S. Court of Appeals, 9th Circuit
Case No. 96-70179, Lawrence Fafarman, petitioner, v. U.S. Environmental Protection Agency, respondent
Date of entry: April 12, 1996
Before: Hall, Thompson, and Rymer, Circuit Judges
Filed as an *original* action in the 9th Circuit Court of Appeals (therefore there is no district court judgment)
Text:

> A review of the petition for review and the letter challenged in the petition demonstrates that this court lacks jurisdiction to entertain the petition for review. The September 20, 1995 letter of explanation, written by an attorney employed by the respondent agency, is not a final action of the Administrator for purposes of 42 U.S.C. § 7607(b). See Pacificorp. v. Thomas, 883 F.2d 661 (9th Cir. 1988). Furthermore, if the letter were a final action, the petition would be untimely. Petitioner may challenge the agency's actions only in an action filed in the district court pursuant to 5 U.S.C. §§702-704. Consequently, this petition is dismissed for lack of jurisdiction.
>
> No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

Relationship of the preceding case, 9th Cir. Case 96-70179, to the present case, 9th Cir. Case 96-55384: The

EPA, in the Brief for the Federal Appellee at 9-10 in Case No. 96-55384, stated:

> Fafarman also filed a related case, Fafarman, v. EPA, Docket No. 96-70179, a petition for review with this Court, seeking review of alleged final agency action in the form of the September 20, 1995 letter from EPA and of EPA's alleged inaction in not revoking the California waiver. Fafarman's petition sought an order from this court requiring EPA to "conduct a full official review of the California waiver."

LAWS AND CONSTITUTIONAL PROVISIONS

42 U.S.C. §7543 State Standards

(a) Prohibition No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emissions standards) for the control of emissions from new

motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that --

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcment procedures are not consistent with section 7521(a) of this title.

(2) .....

(3) .....

- -

28 U.S.C. §1341 (Tax Injunction Act)

The District Court shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

- -

COMMERCE CLAUSE OF U.S. CONSTITUTION

(art. I, sec. 8) The Congress shall have power -- (clause 3) To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

- -

PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION

(Art. IV, Sec. 2, Clause 1) The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

- -

ELEVENTH AMENDMENT OF THE U.S. CONSTITUTION

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state.